

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
OFFICE OF THE CHIEF ADMINISTRATIVE HEARING OFFICER

November 25, 1997

UNITED STATES OF AMERICA,)	
Complainant)	
)	8 U.S.C. 1324a Proceeding
vs.)	
)	OCAHO Case No. 97A00086
ZIP CITY PARTNER, L.P.,)	
D/B/A ZIP CITY BREWING,)	
Respondent)	

FINAL DECISION AND ORDER

Appearances: Lisa Fried, Esquire, Immigration and Naturalization Service, United States Department of Justice, New York, New York, for complainant;
Andrew Chow, Esquire, New York, New York, for respondent.

Before: Administrative Law Judge McGuire

On November 26, 1996, the United States Department of Justice, Immigration and Naturalization Service (complainant/INS), issued and served upon Zip City Partner, L.P. d/b/a Zip City Brewing (respondent) Notice of Intent to Fine (NIF) NYC 95 EO 000 269. That four-count citation alleged 111 paperwork violations of the Immigration Reform and Control Act of 1986 (IRCA), 8 U.S.C. § 1324a, for which civil money penalties totaling \$41,290 were assessed.

In Count I of the NIF, complainant alleged that respondent had violated the provisions of 8 U.S.C. § 1324a(a)(1)(B) by having failed to prepare and/or make available for inspection Forms I-9 for the 43 individuals named therein, all of whom were hired by respondent after November 6, 1986, for employment in the United States. Civil money penalties of \$370 were assessed for each of 42 of those alleged violations and \$470 for the remaining alleged violation, for a total of \$16,010.

In Count II, complainant alleged that respondent had violated the provisions of 8 U.S.C. § 1324a(a)(1)(B) by having failed to ensure proper completion of section 1 and also by having failed to properly complete section 2 of the Forms I-9 for each of the 37 individuals named therein, all of whom were hired by respondent after November 6, 1986, for employment in the United States. Civil money penalties of \$350 were assessed for each of 24 of those alleged violations and \$450 for each of the remaining 13 alleged violations, for a total of \$14,250.

In Count III, complainant alleged that respondent had violated the provisions of 8 U.S.C. § 1324a(a)(1)(B) by having failed to properly complete section 2 of the Forms I-9 for each of the 30 individuals named therein, all of whom were hired by respondent after November 6, 1986, for employment in the United States. Civil money penalties of \$350 were assessed for each of 29 of those alleged violations and \$450 for the remaining alleged violation, for a total of \$10,600.

In Count IV, complainant alleged that respondent had violated the provisions of 8 U.S.C. § 1324a(a)(1)(B) by having failed to ensure that the one (1) employee named therein, who was hired by respondent after November 6, 1986, for employment in the United States, properly completed section 1 of the Form I-9. A civil money penalty of \$430 was assessed for that single alleged violation.

The wording of the NIF clearly advised the respondent of its right to file a written request for a hearing before an Administrative Law Judge assigned to this Office provided that such written request be filed within 30 days of its receipt of the NIF.

On December 24, 1996, Andrew K. Chow, Esquire, respondent's counsel of record, timely filed a written request for hearing.

On April 3, 1997, complainant filed the four (4)-count Complaint at issue, realleging the 111 violations set forth in Counts I through IV of the NIF, as well as the requested \$41,290 total civil money penalties sum.

On April 14, 1997, a Notice of Hearing on Complaint Regarding Unlawful Employment, along with a copy of the Complaint at issue, were served upon respondent and also upon respondent's counsel of record, Andrew K. Chow, Esquire.

On May 15, 1997, respondent's answer was filed. In that responsive pleading, respondent denied the allegations in the Complaint and asserted two (2) affirmative defenses, to the effect that a Chapter 7 involuntary bankruptcy petition was filed against respondent on April 4, 1997 in the U.S. Bankruptcy Court for the Southern District of New York, and that respondent permanently ceased to operate its business on May 7, 1997.

On June 5, 1997, complainant served respondent with a Request to Admit Facts and Genuineness of Documents. Respondent did not reply to that request.

On August 1, 1997, complainant filed a pleading captioned Complainant's Motion for Summary Decision requesting that summary decision be granted in its favor on the 111 facts of violation alleged in the Complaint. Respondent did not file a response to that dispositive motion.

On September 9, 1997, by way of an appropriate order, complainant's August 1, 1997 Motion for Summary Decision was granted on the facts of violation for each of the 111 violations set forth in Counts I, II, III and IV of the Complaint.

The provisions of that order also invited the parties to submit concurrent written briefs by Friday, October 3, 1997, concerning the appropriate civil money penalties to be assessed for those 111 violations, utilizing the five (5) criteria set out at 8 U.S.C. § 1324a(e)(5), 8 C.F.R. § 274a.10(b)(2)(1996).

On September 30, 1997, complainant's unopposed request for additional time to file its penalty brief, or until Monday, October 27, 1997, was granted.

On October 27, 1997, complainant filed a Motion for Approval of Complainant's Proposed Civil Monetary Penalty Amounts, together with a memorandum of law and the Declaration of Special Agent Anthony Scandiffio, in support of its assertion that the previously-assessed total civil money penalties sum of \$41,290 had been properly levied. As noted earlier, the INS assessed civil money penalties in Count I ranging from \$370 for each of 42 violations, and \$470 for the remaining single violation in that count; in Count II \$350 for each of 24 violations, and \$450 for the remaining 13 violations in that count; in Count III \$350 for each of 29 violations, and \$450 for the remaining single violation in that count; and in Count IV \$430 for one (1) violation.

Respondent declined to accept the invitation to file a brief concerning these proposed civil money penalty assessments.

IRCA provides for civil money penalties for employers who fail to comply with IRCA's paperwork provisions and those fines range from a statutorily mandated minimum of \$100 to a maximum of \$1,000 for each violation.

The proposed civil money penalties must be assessed utilizing the five (5) statutory criteria set forth at 8 U.S.C. § 1324a(e)(5):

- (1) the size of the business of the employer being charged,
- (2) the good faith of the employer,
- (3) seriousness of the violation,
- (4) whether or not the individual was an unauthorized alien, and
- (5) the history of prior violations.

Complainant argues that in view of the fact that the recommended penalties could be aggravated owing to the seriousness of the violations, together with the fact that unauthorized aliens were involved as related in the Declaration of Special Agent Scandiffio, the proposed \$41,290 civil money penalties sum is in order. Complainant did not address the remaining factors, and thus concedes that the respondent is entitled to mitigation of its civil money penalties based on the remaining statutory factors. United States v. Anchor Seafood Distribs., Inc., 5 OCAHO 758 (1995).

The discretionary assessment range in which the INS must operate is \$99,900, or the difference between the statutorily imposed minimum of \$11,100 and the maximum sum of \$111,000 for these 111 violations. In having assessed a total penalty of \$41,290, INS moved upwardly \$30,190 in its \$99,900 discretionary assessment range, or an increase of some 30 per-cent.

Viewed from that perspective, I find that complainant acted reasonably in having assessed civil money penalties averaging \$371.98 for each of these 111 violations, or a total sum of \$41,290.

Accordingly, after having carefully considered the five (5) previously-mentioned statutory factors, and in the absence of a finding that the complainant abused its discretion in having assessed these civil penalty sums, the total civil penalties sum of \$41,290 for these 111 infractions is being affirmed.

Order

Having determined that respondent violated the paperwork provisions of 8 U.S.C. § 1324a in the manners described in the four (4)-count Complaint at issue, it is ordered that the total civil money penalty sum for the 111 proven violations is \$41,290, as previously assessed.

Joseph E. McGuire
Administrative Law Judge

Appeal Information

This Decision and Order shall become the final order of the Attorney General unless, within 30 days from the date of this Decision and Order, the Chief Administrative Hearing Officer shall have modified or vacated it. Both administrative and judicial review are available to respondent, in accordance with the provisions 8 U.S.C. §§ 1324a(e)(7), (9) and 28 C.F.R. § 68.53 (1996).

CERTIFICATE OF SERVICE

I hereby certify that on this 25th day of November, 1997, I have served copies of the foregoing Final Decision and Order to the following persons at the addresses shown, in the manner indicated:

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